No. 16002

United States
Court of Appeals
For the Ninth Circuit

HAROLD ROBERTS, et al., Appellants,

vs.

FEDERAL CROP INSURANCE CORPORATION, Appellee.

Reply Brief of Appellants

Appeal from the United States District Court for the Eastern District of Washington
Northern Division

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INDEX

CASES AND TEXTS

Appellee's position that there are two reasons why the doctrine of estoppel should not be invoked against the appellee is based on several erroneous assumptions and impressions of the positions of the parties in the case at bar.

Appellant will set forth the assumptions and point out the error in them by way of argument on the basis that if appellee's argument is invalid, appellee's position is not sound.

On pages 5 and 6 of appellee's brief appellee assumes that appellant is relying on the acts of the individual agents and employees regarding the contract as the basis for waiver or estoppel. Appellant's position is and has been that it was the act of the corporation itself which is the basis of the waiver or estoppel and that the agents merely stated to appellants what the corporation had done with relations to the claims. This position of appellant is sound, as is displayed in the Fretts letter appearing on pages 52 and 53 of the Transcript of record, wherein Mr. Fretts stated as follows:

"We believe Mr. Lawson rather adequately set forth *the position of the corporation* under the reseeding requirements of the wheat crop insurance policy in his reply to your letter," and when he stated further, "This, we believe, sufficiently sets forth *the position*

which this corporation is compelled to assume." (Italics ours). They were not the unauthorized acts of Fretts and Lawson as individuals, but were the acts of the corporation, which acts as related by Fretts and Lawson that is the basis for the claimed waiver of the filing of proofs of loss.

Appellees take the position that the statements as made were in direct contravention of law and the defendant could not be bound to do something that the law does not sanction or permit. That the corporation could change the provisions of the proof and notice of loss provisions is clearly evident by the language of the provisions of the contract. Paragraph 14 of the policy is filled with parenthetical expressions as follows: (a) "If any damage occurs to the insured crop during the growing season and a loss under the contract is probable notice in writing (*unless otherwise provided by the Corporation*) shall be given," etc., (b) If a loss under the contract is sustained, notice in writing (*unless otherwise provided by the Corporation*) shall be given," etc., and again in paragraph 28 of the policy wherein it states, "nor shall the terms of such contract be waived or changed (*except as authorized in writing by a duly authorized officer or representative of the Corporation.*" (Italics ours). It is thus clearly shown by the terms of the contract

that the contract could be changed by the corporation within the law so the acts were not unlawful, nor in contravention of any law, in or out of the Federal Register. It is admitted in the answer and amended answer of appellee that Lawson was authorized to speak for the corporation. This appears in the record (R. 7 and R. 18) in the following language: "... and that he was authorized to speak for the corporation; and said statement was in accord with provisions of the act and the wheat insurance contracts."

On page 11 of the brief, appellee has assumed that the filing of notice and proof of loss was a condition precedent to liability of the corporation under the contract. Paragraph 17 of the contract specifies the conditions precedent to liability. Neither the filing of notice of loss nor proof of loss appears on the list as being conditions precedent to liability.

With relation to the cited cases, appellant draws the following distinctions between the facts of those cases and those of the case at bar.

This is not a case against the United States but is a case against a government corporation which has entered into the field of private business. The moneys sought are not funds in the public treasury but are the funds of the corporation. For that reason we feel that the various restrictions in suits against the United

States are not applicable. The following language in U. S. v. Shaw, 137 F. Supp. 24, is apt:

> "An equitable estoppel ordinarly may not be invoked against a government or public agency functioning in its governmental capacity; but where the elements of an estoppel are present it may be asserted against the government when acting in its proprietary capacity. 31 C.J.S., Estoppel, § 138, pp. 403, 404; 19 Am. Jur., Estopped, Section 169, p. 822."

This language should be equally applicable to waiver.

This is not a case where the appellant relied on an adjuster, County Committeemen, or other personnel of the corporation in the county offices to state correctly the position of the corporation. In the cited cases, reliance was placed on the view of the Corporation as stated by County level officers and agents who gave an erroneous statement of the position of the Corporation. In this case the appellants relied on the highest Corporate official in the State of Washington, and on the Washington, D. C., manager of the corporation itself to relate the corporate position and the position was accurately reported to appellants. Since it was apparent to appellants that the filing of the formal proofs of loss would be completely useless, none were filed. Filing of proofs had been waived by the action of the Corporation and the Corporation is estopped.

In conclusion, may we say that the facts of the wheat loss must be considered in order that the relative positions of the parties can be ascertained at the time when the dispute arose. The appellants had a loss covered by insurance. The appellee refused to pay the loss, not on the basis that no proofs were filed, but on the basis that there was no liability under the facts. Appellee's manager and its Washington State director, who, incidentally, claimed to be authorized, which authorization was admitted by appellee in its pleadings (R. 7 and R. 18), in all their correspondence, statements and other communications, never raised any objection to payment on the basis that no proofs of loss were filed. Appellee's counsel in their pleadings made no issue of this fact, but answered on the basis again that there was no liability under the contract and facts of the loss.

Appellants entered into this insurance contract in good faith feeling that an agency of its own government would be anxious to fulfill its contract obligations. We feel that this Court should require that the Federal Crop Insurance Corporation defend its position on the merits, and that it should not be permitted to escape liability on the basis sought when the basis arose from acts of the corporation itself, relied upon by appellants.

Inasmuch as the Federal Crop Insurance Corporation is not a governmental function but a proprietary function of the government, we resubmit to this Court that the facts of his case bring the case squarely within the principles of law as stated in 29 Am. Jur., page 859, para. 1143, as follows:

> "A denial of liability by an insurer, made during the period prescribed by the policy for the presentation of proofs of loss, and on grounds not relating to the proofs, will ordinarily be considered a waiver of the provision of the policy requiring proofs to be presented, or a waiver of the insufficiency of the proofs or of defects therein. The denial of liability is equivalent to a declaration that the insurer will not pay although proofs are furnished in accordance with the policy, and the law will not require the doing of a vain or useless thing."

Respectfully submitted,

KIMBALL & CLARK,

Attorneys for Appellants.